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Tom L. Popejoy

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CREDIT BUREAUS AND CONSUMERS— REGULATION AND REMEDY IN NEW MEXICO

Credit has become the keystone of the American economy, as even the most cursory glance at your wallet (full of credit cards) and checkbook (full of payments to creditors of all kinds) will indicate.¹ The system of credit bureaus and other investigative agencies is essential to the functioning of our credit economy. It provides creditors and others with information necessary for the granting of credit, the hiring of personnel, or other purposes.² A typical report on a given individual includes data on his financial standing, legal involvements (arrests, lawsuits, divorces, and bankruptcies), employment, and sometimes opinions about his character and reputation.³ Needless to say, such information is of a highly personal nature, and the potential for invasion of privacy⁴ is great. Further, some of the procedures presently used by credit bureaus in obtaining data invite inaccuracy at best and misrepresentation and defamation at worst.⁵ Curiously, however, in spite of abuses, the credit reporting industry operates with only limited regulation,⁶

1. Consumer installment credit outstanding now exceeds \$100 billion and is growing rapidly, both in absolute terms and in comparison to cash transactions. It has been estimated that 60% of the average individual's income is used to pay credit obligations. *Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 91st Cong., 1st Sess. 12, 91 (1969) [hereinafter cited as *Fair Credit Hearings*].

2. Statement of Alan F. Westin, *id.* at 90-91.

3. Sample credit reports, insurance reports, and personnel investigation reports and inquiry forms may be found in *Fair Credit Hearings* 52-53, 196-203, 208-11, 278-87, 306-12.

4. The right to privacy as a legal concept has been defined as:

. . . freedom or power of an individual . . . to determine the extent to which another . . . may (a) obtain or make use of his ideas, writings, name, likeness, or other indicia of identity, or (b) obtain or reveal information about him . . . or (c) intrude physically or in more subtle ways into his life space and his chosen activities.

Beane, *The Right to Privacy and American Law*, 31 *Law & Contemp. Prob.* 253, 254 (1966). The invasion of privacy issue arises mainly from the collection and dissemination of highly personal information to credit grantors. See, e.g., Morris, *What Credit Bureaus Know About You*, *Reader's Digest*, Nov. 1967, at 85; M. Brenton, *The Privacy Invaders* (1964). A comprehensive bibliography of materials on the subject may be found in *Fair Credit Hearings*, *supra* note 1, at 96-97.

5. For a detailed description of the manifold problems of inaccurate reporting, see *Fair Credit Hearings*, *supra* note 1, at 428-30.

6. Most of the regulation of credit bureaus and investigative agencies is in the form of revenue measures. For a collection and citations to such statutes, see Note, *Credit Investigations and the Right to Privacy: Quest for a Remedy*, 57 *Geo. L.J.* 509, 527-29 nn. 124-37 (1968). Oklahoma is one of the few states with a statute dealing specifically with the credit bureau problem. Okla. Stat. Ann. tit. 24, § 81-85 (1965). New Mexico recently passed a statute which is discussed in the text accompanying note 68 *infra*. N.M. Stat. Ann. §§ 50-18-1 to -6 (Supp. 1969).

and debtors who are abused are virtually without remedy.⁷ It is the purpose of this Comment to briefly examine the credit reporting industry and its shortcomings, evaluate a recent New Mexico case as an example of present judicial treatment, and recommend legislative action as a solution to some of the problems involved.

The credit reporting industry has grown in proportion to the growth of credit in general. "The Associated Credit Bureaus of America (ACB of A) has over 2,200 member bureaus, servicing 400,000 credit grantors in 36,000 communities across the nation and in many foreign countries. ACB of A members maintain credit files on more than 110 million individuals and issued 97.1 million credit reports in 1967."⁸ The industry also includes personnel and insurance investigation agencies, such as Retail Credit Co.,⁹ as well as private detectives.¹⁰ The advent of the computer into the credit reporting field has provided credit bureaus and their clients with quick access to masses of information.¹¹ ACB of A members exchange information so freely that a subscriber in Atlanta, Georgia, need only contact his local credit bureau to receive quickly a credit report on a credit applicant in Albuquerque, New Mexico.¹²

The users of this information include not only credit grantors, insurance companies, and employers, but also government agencies including the F.B.I. and the Internal Revenue Service.¹³ The type of information contained in a report varies depending on the needs of the inquirer. While a bank may only require information regarding one's employment, bill-paying habits, loans outstanding and matters of public record (arrests, law suits, divorces and bankruptcies), insurance companies and employers sometimes ask for information regarding an applicant's drinking habits, appearance, domestic troubles, character, and morals.¹⁴

The possibilities for injury to the subjects of credit reports arise essentially out of three facets of the credit reporting process: First, misuse, or even non-essential use of highly personal information

7. See text accompanying note 29 *infra* and following.

8. *Fair Credit Hearings*, *supra* note 1, at 91.

9. Retail Credit Co. has representatives in 1800 locations in the U.S. and Canada, employs 6,300 salaried investigators, maintains current files on 45 million persons and issued 35 million reports in 1967, of which 10% were in employment checks. Many credit bureaus also do personnel investigation. *Id.* at 87.

10. *Id.*

11. *Hearings on Commercial Credit Bureaus Before a Subcomm. of the House Comm. on Government Operations*, 90th Cong., 2d Sess. 109-21 (1968) [hereinafter referred to as *Credit Bureau Hearings*].

12. *Id.*

13. *Fair Credit Hearings*, *supra* note 1, at 92, 433.

14. See note 3 *supra* for citations to specific examples of reports to employers and insurance companies.

tends to invade the privacy of the individual. The importance of protecting this privacy was perhaps best expressed by Samuel D. Warren and Louis D. Brandeis in their famous article:

The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions on his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.¹⁵

There is, of course, a counter-balancing public interest in allowing credit grantors to garner information pertinent to the risk they incur, but the information gathered should be only that *relevant* to the purpose for which it is sought. Specifically, it is at least questionable whether a department store needs to be advised of one's general "reputation" before granting a charge account.¹⁶ Credit reports should be limited to information pertinent to granting credit—namely, bill-paying habits, income, outstanding debts and other matters of a financial nature. Limitation to relevant matters should also be required of insurance reports and personnel reports.

Second, the process of gathering and disseminating information permits error or misapprehension.¹⁷ Provisions for correction of error are either inadequate or non-existent.¹⁸ For example, personal information in a report is often obtained by interviews with the debtor's neighbors, business associates, and acquaintances.¹⁹ However, the data are neither verified nor cleared with the debtor.²⁰ Indeed, the debtor is generally not even notified that he is being

15. Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 196 (1890).

16. The ACB of A has deleted references to "character" from its standard reporting forms, but to what extent such information is still reported by member and non-member firms is unclear. *Fair Credit Hearings*, *supra* note 1, at 432.

17. Senator William Proxmire divides the causes of inaccuracy into five categories: (1) confusion with other persons, whereby an item referring to one person is placed on the record of another with a similar name; (2) biased information, whereby only the creditor's side of the story appears on the record; (3) gossip and hearsay, whereby the unchallenged information of neighbors or coworkers appears on a report; (4) computer and clerical errors; and (5) incomplete information, whereby the credit record shows a suit filed without showing the ultimate determination of the action. *Fair Credit Hearings*, *supra* note 1, at 428-30.

18. Consumers have difficulty correcting adverse reports about themselves, since many do not know the existence of investigative agencies or of the fact that their file contains inaccurate information. *Fair Credit Hearings*, *supra* note 1, at 430-31.

19. *Fair Credit Hearings*, *supra* note 1, at 428-30.

20. *Id.*

investigated.²¹ As a result, personal opinion is given the appearance of objective fact when the report is published and circulated. Furthermore, a report often lists failure to pay a bill, or a suit filed, without providing supplementary or follow-up information.²² A debtor may have failed to pay a bill because he was in the hospital, or he may have had a suit filed against him which was ultimately resolved in his favor.²³ Yet the report doesn't include these circumstances.²⁴ The result is a detrimental and false impression.

Third, the lack or inadequacy of statutory regulation of information-gathering agencies²⁵ and their virtual immunity from damage suits²⁶ tend to encourage these agencies to refrain from policing themselves. While some agencies have recently sought to improve their procedures,²⁷ they have apparently done so only under the pressure of public opinion and threatened action by Congress,²⁸ which suggests that when the heat dies down, so will the improvements. Under these circumstances some sort of regulation, either judicial or legislative, is desirable to protect individuals from the wrongs inherent in the system.

A recent New Mexico Court of Appeals case exemplifies the judicial remedies available to those seeking redress for misinformation circulated by credit bureaus.²⁹ The case arose because the plaintiff's name had been published in defendant's credit service publication, which indicated that plaintiff was in debt to a department store and that the debt was past due. Plaintiff was unaware of the existence of the debt, since it had been incurred by his daughter while she was living with his former wife. Defendant's publication was regularly circulated to approximately seventy subscribers within a seventy mile radius of plaintiff's home town. Plaintiff contended that the statements published were "false, defamatory and maliciously made with intent to injure [plaintiff]; that [he] was embarrassed thereby and was held up to public ridicule whereby he was entitled to recover general and punitive damages."³⁰ The case

21. Retail Credit will neither confirm nor deny that it made a report on an individual. *Fair Credit Hearings*, *supra* note 1, at 430.

22. See *Fair Credit Hearings*, *supra* note 3; *Credit Bureau Hearings*, *supra* note 11, at 10-11.

23. *Credit Bureau Hearings*, *supra* note 11, at 10-11.

24. *Id.*

25. See note 6 *supra* and accompanying text.

26. See the discussion beginning with the text accompanying note 29 *infra*.

27. *Fair Credit Hearings*, *supra* note 1, at 82-83, 150-56.

28. *Id.* at 82.

29. *Thomas v. Frost*, 79 N.M. 125, 440 P.2d 800 (Ct. App. 1968).

30. *Id.* at 126, 440 P.2d at 801.

was tried without a jury, and the district judge dismissed the complaint.

For purposes of decision, the New Mexico Court of Appeals assumed that plaintiff did not owe the debt.³¹ It disposed of the case on the issue of whether the publication was libelous per se.³² In holding the publication not libelous per se, the court reviewed the requirements established by the New Mexico supreme court in deciding such cases. To be libelous per se, the writing must be malicious, false, and have a tendency to render the subject "contemptible or ridiculous in public estimation, or expose him to public hatred or contempt, or to hinder virtuous men from association with him."³³ Further, the words themselves must be "stripped of all insinuations, innuendo, colloquialisms and explanatory circumstances," and "must be susceptible of but a single meaning and a defamatory meaning must be the only one of which the writing is susceptible."³⁴ The court of appeals, reasoning that defendant's writing was not malicious and that it did not hold plaintiff up to public contempt or ridicule, affirmed the lower court's dismissal of the complaint.³⁵

The *Thomas* case is a clear demonstration of the inadequacy of present judicial remedies in the area of credit reporting. A suit in libel is difficult to maintain in the best of circumstances, but in the field of credit reporting, such suits are almost always unsuccessful because credit bureaus are accorded a conditional privilege.³⁶ The New Mexico court's division of libel into libel per se and libel per quod makes recovery virtually impossible.³⁷ Libel per se, while not requiring a showing of actual damages, does require a showing of

31. *Id.* at 127, 440 P.2d at 802.

32. Plaintiff apparently attempted to persuade the court to reconsider and disregard the distinction between libel per se and libel per quod. He did not allege or prove actual or special damages, and as a result, the court felt constrained to consider the case in terms of libel per se. See the opinion of the court, *Id.* at 128, 440 P.2d at 803.

33. *Id.* at 127, 440 P.2d at 802, quoting *McGaw v. Webster*, 79 N.M. 104, 440 P.2d 296 (1968).

34. *Id.*

35. *Thomas v. Frost*, *supra* note 29, at 129, 440 P.2d at 803.

36. The privilege is accorded when the report information is circulated only to subscribers who are legitimately interested in the contents, though the definition of "legitimate interest" is cloudy. See, e.g., *H.E. Crawford Co. v. Dun & Bradstreet, Inc.*, 241 F.2d 387 (4th Cir. 1957). A minority of jurisdictions hold that negligence will destroy the privilege. E.g., *Altoona Clay Prods., Inc. v. Dun & Bradstreet, Inc.*, 367 F.2d 625 (3d Cir. 1966). A more complete discussion of judicial remedies in other states may be found in Note, *Credit Investigations and the Right to Privacy: Quest for a Remedy*, 57 *Geo. L.J.* 509 (1968).

37. See also Comment, *Torts—Libel and Slander—The Libel Per Se—Libel Per Quod Distinction in New Mexico*, 4 *Natural Resources J.* 590 (1965).

malice.³⁸ It is doubtful that any injured party could ever prove malice on the part of a credit bureau in reporting inaccurate or misleading information. The inaccuracies in credit records and reports result from carelessness or failure to verify the substance of the information, not from a desire to defame maliciously.³⁹ If a party attempted to sue in libel per quod to avoid the necessity of alleging malice, he would have to prove actual damages; i.e., actual pecuniary loss. If one suspects he has been denied credit or employment as a direct result of information in a credit report, he has a long way to go to convert his suspicions into proof of loss.⁴⁰ In any event, the *Thomas* case now presents a formidable obstacle to recovery in itself, solely from the standpoint of judicial precedent.

While there are other possible approaches which an aggrieved party may take, virtually all of them have disadvantages. Professor Alan Westin suggests that personal information be treated as a property right and that agencies be subjected to the due process requirements of the Fourteenth Amendment.⁴¹ This would probably require the investigating agency to notify the debtor of the pending report and to allow him to object to all or part of the information contained. However, there is no judicial precedent for this approach, and the application of it would necessarily require a showing of "state action" with regard to the investigating agency.⁴² Another writer has suggested using the right of privacy to control investigative reporting.⁴³ However, the lack of precedent plus the peculiar conceptual difficulties in this area render the pos-

38. The New Mexico supreme court has held that malice will be implied to words actionable as libel per se, but only if the publication is not privileged. *Vigil v. Rice*, 74 N.M. 693, 397 P.2d 719 (1964).

39. This is not to say, however, that credit bureau *employees* will not use their access privileges maliciously to disseminate derogatory information about individuals. Cf., *Do Credit Bureaus Know Too Much About You?* Parade Magazine, No. 3, 1968, at 7. See also *Fair Credit Hearings*, *supra* note 1, at 428-32.

40. The contract between the investigative agency and the user of information requires the user not to reveal the information in the report or the source of the report. *Fair Credit Hearings supra* note 1, at 88. Thus, one believing he has been denied credit or employment because of a false report will have great difficulty in persuading any user of the report to admit that the particular item in question was one of the reasons for the denial. See, e.g., *Fair Credit Hearings, supra* note 1, at 84.

41. A. Westin, *Privacy and Freedom* 324-25 (1967).

42. The Fourteenth Amendment provides that "[no] state [shall] deprive any person of life, liberty, or property, without due process of law . . ." U.S. Const. amend. XIV, § 1. Thus, one would have to show a sufficient nexus between the investigating agency and the state so that the actions of the agency qualify as "state action." See, e.g., *United States v. Guest*, 383 U.S. 745 (1966).

43. Note, *Credit Investigations and the Right to Privacy: Quest for a Remedy*, 57 Geo. L.J. 509 (1968).

sibilities of success doubtful.⁴⁴ In sum, the problems in the field are not likely to be solved by the use of judicial remedies.

The foregoing discussion has demonstrated certain problems in the field of credit and personal information reporting⁴⁵ and the inadequacy of available judicial remedies.⁴⁶ Legislative regulation is the appropriate solution to these problems, not only because legislation can be organized and invoked to resolve *all* the problems, but also because a remedy is needed now.⁴⁷

What should legislation attempt to do? At a minimum, it should regulate (or establish a means for regulating) the methods and procedures of both the gatherers and the users of information to prevent undue invasion of privacy and to require reasonable efforts to avoid inaccuracy, incompleteness, and bias.⁴⁸ The following considerations are proposed as essential to an effective legislative scheme of regulation in this area:

1. *Scope*: While most of the recent discussion in this area has focused on *credit* bureaus, there are similar problems with private investigators, insurance investigators, and personnel investigators as well. Therefore, regulation should apply to *all* agencies or persons who investigate persons and sell the resulting data to others. It should also apply to all who use that data.

2. *Consent*: The usual credit investigation does not generate information the dissemination of which would result in invasion of privacy.⁴⁹ Thus, it is not necessary to require a credit bureau to obtain a debtor's consent before collecting or disseminating this information. However, where an investigation into the subject's personal habits, character, and other matters cognizable under the right to privacy is to be launched, the investigating agency should be required to notify the subject (1) of the investigation and (2) of the identity of inquirer and to obtain his consent before commencing the investigation. Such a provision will have the dual function of protecting the privacy of the subject and protecting the agency from later claims of invasion of privacy.

44. *Id.* at 523-27.

45. See notes 4-28 *supra* and accompanying text.

46. See notes 29-44 *supra* and accompanying text.

47. The continued growth of the information reporting industry is virtually assured, since the economy seems sure to move toward being totally credit-oriented. Because the computer makes possible an easily accessible national data bank in the very near future, protection of consumer interest becomes vital. See generally Gallagher, *Efficiency—Purchased at the Price of Privacy*, *Banking*, April, 1968, at 38.

48. See note 17 *supra* and accompanying text.

49. The "usual type" of credit information is that dealing with previous financial dealings, prior credit arrangements, and information of public record and *not* information dealing with character, family life, morals, and so on.

3. *Notice*: When an agency finds an item of information which may be construed as adverse or derogatory to an individual, the agency should be required to notify the individual of the item's existence and nature.⁵⁰ This requirement is especially important, since many people are unaware that credit bureaus even exist, let alone that credit reports may contain derogatory statements about them.⁵¹

4. *Corrections*: The agency should be required to allow a person, upon request, to inspect the entire file or record which the agency keeps on him. He should then be allowed to submit a statement explaining any derogatory information, and this statement should become part of the file, to be disseminated with the other items contained.⁵² The agency should also be required to make reasonable efforts to verify all information collected.

5. *Use of Information*: Agencies should be required to: (a) disseminate information only to those having a legitimate business interest in that information⁵³ and (b) disseminate only information relevant to the purpose sought to be served by the request. Information of marginal relevance or of a private nature should not be collected or distributed without the debtor's consent.⁵⁴

6. *Notice of Denial*: Anyone denying a person credit, employment, insurance, or other benefits as a result of a report should be required to notify that person of the denial and inform him from which agency the report was obtained.⁵⁵ This requirement is supplementary to the notice requirement (see 3. above) and is designed to assure that individuals will be informed of derogatory data appearing on a report about them.

7. *Records*: Information agencies should be required to keep records of the identities of their sources and the users of information circulated. This requirement will assist enforcement of the other suggested provisions. Also, there should be a requirement that one's file be kept current and that obsolete material be destroyed.⁵⁶

8. *Remedies*: At the present time, credit bureaus enjoy virtual immunity from suit.⁵⁷ Therefore, it would be desirable to create statutory remedies to provide relief for aggrieved persons. A civil remedy would be sufficient to enforce the suggested requirements,

50. See S. 2522, 91st Cong., 1st Sess. § 164(a) (1969), note 65 *infra*.

51. See notes 19, 22, and 40 *supra* and accompanying text.

52. See S. 2522, 91st Cong., 1st Sess. § 164(a) (1969), note 65 *infra*.

53. See S. 823, 91st Cong., 1st Sess. § 164(f)(i) (1969), note 64 *infra*.

54. *Id.* at § 164(c).

55. *Id.* at § 165.

56. *Id.* at § 164(d).

57. See notes 29-44 *supra* and accompanying text.

thus making the legislation preventive as well as compensatory. There should be liability for negligent or willful violation of the provisions of the legislation by either a reporting agency or a user. The inclusion of negligence is important, since few, if any, of the present problems in the field arise from willful conduct.⁵⁸ Legislation should provide at least the following remedies:⁵⁹ (1) damages for actual losses incurred as a result of failure to meet the provisions of the legislation, (2) punitive damages⁶⁰ and (3) injunctive relief.⁶¹

Effective regulation of the information reporting industry will require both federal⁶² and state legislation.⁶³ Two bills presently before Congress, S. 823⁶⁴ and S. 2522,⁶⁵ when read in conjunction,

58. See note 39 *supra* and accompanying text.

59. See, e.g., S. 823, 91st Cong., 1st Sess. § 166 (1969), note 64 *infra*.

60. A provision for punitive damages is desirable since actual damages are often very difficult to prove. See note 40 *supra* and accompanying text.

61. Injunctive relief is more immediately available than are civil damages.

62. Federal legislation is needed because the sheer size and extent of the industry would render control by less than all the states ineffective. Further, uniformity of regulation is desirable from the industry's viewpoint.

63. Federal legislation would undoubtedly be couched in terms of interstate commerce. Since some credit bureaus do not belong to any national associations or utilize national facilities, state regulation is needed to fill the jurisdictional gap. Cf. *Fair Credit Hearings*, *supra* note 1, at 38-58.

64. S. 823, 91st Cong., 1st Sess. §§ 161-65 (1969). A BILL. To enable consumers to protect themselves against arbitrary, erroneous, and malicious credit information.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,
Section 1. (a) The Truth in Lending Act is amended by adding at the end thereof the following new chapter:

"Chapter 4—CREDIT REPORTING AGENCIES

"§ 161. Short title

"This chapter may be cited as the Fair Credit Reporting Act.

"§ 162. Findings and purpose

"(a) The Congress makes the following findings:

"(1) An elaborate interstate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character and general reputation of individuals.

"(2) In an economy which depends increasingly upon information on individuals for the extension of credit and the movement of goods and services there is a need that such information be accurate and readily ascertainable.

"(3) Credit reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers and individuals.

"(4) There is a need to insure that credit reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the individual right to privacy.

"(b) It is the purpose of this chapter to require that all credit reporting agencies, utilizing the facilities of interstate commerce, adopt reasonable procedures, in accordance with regulations prescribed by the Board, for meeting the needs of commerce for credit and other information in a manner which is fair and equitable to the individual.

provide sufficient regulation in terms of the standards set forth above, with two important exceptions: (1) the legislation refers

“§ 163. Definitions and rules of construction

“(a) Definitions and rules of construction set forth in this section are applicable for the purposes of this chapter.

“(b) The term ‘credit rating’ means any evaluation or representation as to the credit worthiness, credit standing, credit capacity, character, or general reputation of any individual.

“(c) The term ‘credit report’ means any written, oral, or other communication of any credit rating, or of any information which is sought or given for the purpose of serving as a basis for a credit rating.

“(d) The term ‘credit reporting agency’ means any person who regularly engages in whole or in part in the business of furnishing credit reports, and for the purpose of preparing or furnishing them uses any means or facility of interstate commerce.

“§ 164. Requirements on credit reporting agencies

“Every credit reporting agency shall follow procedures, in conformity with regulations prescribed by the Board, to achieve the following objectives:

“(a) To insure the confidentiality of information obtained by the agency which bears upon the credit rating of any individual.

“(b) To provide any individual, upon request, a reasonable opportunity to correct information obtained by the agency which may bear adversely upon his credit rating.

“(c) To limit the collection, retention, or furnishing of information bearing upon the credit rating of any individual to those items essential for the purposes for which the information is sought and to preclude the collection, retention, or furnishing of information which only marginally benefits the purposes for which the information is sought or which represents an undue invasion of the individual’s right to privacy.

“(d) To keep current information bearing on the credit rating of any individual and to destroy such information after it has become obsolete or after the expiration of a reasonable period of time.

“(e) To notify promptly any individual whenever information which is a matter of public record is obtained by the agency and which is, or is likely to be interpreted by the agency or its clients as, adverse to the credit rating of the individual, and to provide a reasonable opportunity to the individual to submit an explanatory statement with respect thereto.

“(f) To insure that, unless the individual on whom the information is being furnished agrees otherwise in writing, the information obtained by the agency is furnished only—

“(1) to persons with a legitimate business need for the information and who intend to use the information in connection with a prospective consumer credit or other transaction with the individual on whom the information is furnished; and

“(2) for the purposes disclosed in the collection of the information.

“§ 165. Requirements on users of credit reports

“Whenever credit pursuant to a consumer credit transaction is denied or other prospective transaction with an individual is canceled wholly or partly because of a report from a credit reporting agency, the person involved shall so notify the individual to whom the credit is denied or with whom the prospective transaction is canceled and shall supply the name and address of the credit reporting agency making the report.

“§ 166. Civil liability

“(a) Any credit reporting agency or user of information which willfully fails to comply with any requirement imposed under this chapter with respect to any individual is liable to that individual in an amount equal to the sum of—

only to *credit* reporting agencies,⁶⁶ and (2) recovery is permitted only for *willful* violation of its provisions.⁶⁷

The New Mexico Legislature recently enacted a law⁶⁸ which pur-

"(1) any actual damages sustained by the individual as a result of the failure;

"(2) such amount of punitive damages as the court may allow, which shall be not less than \$100 nor greater than \$1,000; and

"(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

"(b) Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within two years from the date of the occurrence of the violation."

65. The portions of S. 2522 which differ from S. 823 are:

S. 2522, 91st Cong., 1st Sess. §§ 164-66 (1969). A BILL. . . § 164. Requirements on credit reporting agencies

"Every credit reporting agency shall follow procedures, in conformity with regulations prescribed by the Board:

"(a) To notify promptly any individual as to information obtained prior to the effective date hereof and thereafter whenever information is obtained by the agency which is, or is likely to be interpreted by the agency or its clients as, adverse to the credit rating of the individual, and to provide a reasonable opportunity to the individual to submit an explanatory statement with respect thereto. The statement so submitted shall thereupon become a part of said individual's credit report for so long as said information is included therein. In making any credit report in which reference is made to information in respect to which a statement has been submitted, the existence of said statement shall be included in such credit report together with the substance thereof.

"(b) To keep all information bearing on the credit rating of any individual current.

"(c) To provide any individual, upon request, a reasonable opportunity to correct information obtained by the agency which may bear adversely upon his credit rating.

"§ 165. Requirements on users of credit reports

"Whenever a prospective transaction with an individual is canceled wholly or partly because of a report from a credit reporting agency, the person involved shall so notify the individual with whom the prospective transaction is canceled and shall supply the name and address of the credit reporting agency making the report.

"§ 166. Civil remedies

"(b) In each State, possession, or territory wherein this Act shall be in effect, the attorney general thereof, or if there is no attorney general an officer designated by the chief executive thereof, is empowered to seek a permanent injunction against any credit reporting agency or user of information which willfully fails to comply with any requirement imposed under this chapter.

66. S. 823 & S. 2522, 91st Cong., 1st Sess. § 163(d) (1969).

67. S. 823 & S. 2522, 91st Cong., 1st Sess. § 166(a) (1969).

68. N.M. Stat. Ann. §§ 50-18-1 to -6 (Supp. 1969). The statute reads as follows:

ARTICLE 18—CREDIT BUREAUS

50-18-1. Definitions.—As used in this act [50-18-1 to 50-18-6]:

A. "credit bureau means any business engaged in furnishing credit information about consumers; and

ports to regulate credit bureaus. The law provides answers to some of the problems discussed herein, but has several important weaknesses which detract from its effectiveness. Following is an analysis of the act in terms of the requirements set forth above:

1. *Scope*: The title of the article and all of its provisions refer

B. "consumer" means any person in the general consuming public.

50-18-2. Availability of information to the public—Liability. —A. Any credit bureau conducting business in the state shall provide trained personnel to interview and counsel with a consumer, during normal business hours, concerning any information about that consumer contained in the credit bureau's files.

B. A credit bureau, upon request, shall disclose the content, but shall not disclose the sources, of all information about that particular consumer which is included in his credit report or rating, if the consumer making the request presents adequate identification.

C. For any consumer to whom credit has been refused because of a credit bureau's report, the credit bureau which compiled the report shall make any necessary reinvestigation and perform any necessary updating or correction of records at no cost to the consumer. A credit bureau may charge a fee of not to exceed five dollars (\$5.00) for any reinvestigation requested by any consumer, if that consumer has not been refused credit on the basis of a credit bureau report.

D. After a credit bureau has been given written notice of any error in its credit report or record by a consumer, the credit bureau is liable for any subsequent report which fails to correct the error. However, prior to receiving written notice of such error, a credit bureau or its source of information is not liable for any damages caused by any reports or dispersal of information which is the result of an unintentional error of either the credit bureau or its source of information.

E. A credit bureau shall give to any consumer examining his credit record forms upon which to designate any errors which the consumer discovers in his credit record or report.

50-18-3. Information to non credit-granting governmental agencies. —A. A credit bureau may supply identifying information such as names, addresses, former addresses, places of employment and former employment to non credit-granting governmental agencies.

B. No other information may be supplied to such governmental agencies, other than as provided in subsection A, by a credit bureau except in response to legal process unless the investigation is for security purposes.

50-18-4. Information to businesses, professions and individuals. —A. In dealing with businesses, professions and individuals, a credit bureau shall require service contracts to be executed in which the regular subscriber or the occasional user certifies that inquiries shall be made only for the purposes of the granting of credit or other bona fide business transaction, such as evaluation of present or prospective credit risks or evaluation of the qualifications of present or prospective employees.

B. The credit bureau shall refuse service to any prospective subscriber or user who will not so certify, and shall discontinue service to any who fails to honor the above contract provisions.

50-18-5. Personnel reporting—Safeguards. —A credit bureau which furnishes personnel-reporting service shall adopt rigid safeguards in order that the specialized information developed in the course of such investigations other than credit information shall be maintained separately, and shall not be incorporated in credit reports or made available to subsequent inquirers except in connection with a subsequent personnel investigation.

to "credit bureaus," which the act defines as "any business engaged in furnishing credit information about consumers."⁶⁹ As previously noted,⁷⁰ many of the problems in the area, particularly those regarding invasion of privacy, arise in insurance and personnel investigation. The New Mexico law provides virtually no protection in these areas.⁷¹

2. *Consent*: The New Mexico statute places no regulation at all on the process of collecting information about individuals. While it does apparently recognize a distinction between credit information and information developed from personnel investigations,⁷² the statute only requires that personnel information be kept separate from credit information and that it not be included in credit reports.⁷³ The statute further provides that personnel information may be made available to inquirers "in connection with a subsequent personnel investigation."⁷⁴ The act does not require consent to an investigation. Therefore, credit bureaus may apparently collect any information they wish and may then distribute that information "in connection with a subsequent personnel investigation"⁷⁵ to any user certifying "that inquiries shall be made only for the purposes of . . . bona fide business transaction, such as . . . eval-

50-18-6. Report information—Limitations. —A. A credit bureau may report the following matters for no longer than the specified periods:

(1) bankruptcies of all types for not longer than fourteen [14] years from the date of adjudication of the most recent bankruptcy;

(2) accounts placed for collection and accounts charged to profit and loss for not longer than seven [7] years, or until the governing statute of limitations has expired, whichever is the longer period;

(3) suits and judgments for not longer than seven [7] years from date of entry, or until the governing statute of limitations has expired, whichever is the longer period;

(4) paid tax liens for not longer than seven [7] years and unpaid tax liens for any length of time;

(5) arrests and indictments pending trial, or convictions of crimes, for not longer than seven [7] years from date of release or parole. Such items shall no longer be reported if at any time it is learned that after a conviction a full pardon has been granted, or after an arrest or indictment a conviction did not result; and

(6) any other data not otherwise specified in this section, for not longer than seven [7] years.

B. A credit bureau shall delete as soon as practical any items of derogatory information whenever it is ascertained that the source of information can no longer verify the item in question from its records of original entry.

69. *Id.* § 50-18-1A.

70. See note 10 *supra* and accompanying text.

71. See, however, N.M. Stat. Ann. § 50-18-5 (Supp. 1969).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

uation of the qualifications of present or prospective employees."⁷⁶ While undoubtedly most users do not desire irrelevant and highly personal information for their business purposes and would not request such information, putting it in their hands should be avoided to protect the individual's right to privacy.⁷⁷ The collection of information in itself may constitute an invasion of privacy.

3. *Notice*: Perhaps the greatest shortcoming of the New Mexico statute is that it does not require a credit bureau to notify a subject when a derogatory item about him is obtained. The malady is perhaps best demonstrated by example: Suppose Mr. Jones, who has never before sought credit, wants to obtain a loan to cover some medical expenses he has incurred. Suppose further that the local credit bureau has received a notice from one of its subscribers that another Mr. Jones with the same first name has not paid a debt owed to that subscriber. Suppose further that, through an entirely non-negligent error, the credit bureau places the bad debt item on our Mr. Jones' credit record.⁷⁸ When the lender requests and receives Mr. Jones' credit report and notes that Mr. Jones' only credit experience has been bad, he may then refuse to make the loan because of the credit report. Since the contract between the lender and the credit bureau prohibits the lender from divulging the nature and source of the credit report,⁷⁹ Mr. Jones will have no way of finding out why he was refused credit. Indeed, he has no way of knowing that the credit bureau even has a file on him, let alone of knowing the contents of the file. Without fault on anyone's part, Mr. Jones has been denied the credit he needed. A statute requiring notice by the credit bureau could avoid this consequence. The fact that the New Mexico statute does not provide for notice will probably greatly weaken its effectiveness, since many consumers will not have sufficient knowledge to take advantage of its provisions.

4. *Correction*: The provisions of the statute in this area are adequate.⁸⁰ Credit bureaus are required to provide a counselor for consumers wishing to discuss their credit,⁸¹ to disclose the content of a consumer's credit file to him (upon request),⁸² to make necessary reinvestigations at little or no cost to the consumer,⁸³ to correct

76. *Id.*

77. *See* note 4 *supra* and accompanying text.

78. Errors of this type are among the most common. *Fair Credit Hearings, supra* note 1, at 428.

79. *See* note 40 *supra* and accompanying text.

80. N.M. Stat. Ann. § 50-18-2 (Supp. 1969).

81. *Id.* § 50-18-2A.

82. *Id.* § 50-18-2B.

83. *Id.* § 50-18-2C.

errors upon written notice from the consumer,⁸⁴ and to provide forms on which to designate such errors.⁸⁵

5. *Use of Information:* (a) The statute requires users to execute contracts with the credit bureau certifying "that inquiries shall be made only for the purposes of granting of credit or other bona fide business transaction . . . ,"⁸⁶ and that the credit bureau shall refuse service to those failing to so certify.⁸⁷ This provision seems to provide adequate safeguards against non-essential use of credit or other information. The statute also restricts the dissemination of information to non-credit-granting governmental agencies.⁸⁸ (b) The statute is silent, however, as to any requirement that the information on a credit report be *relevant* to the purpose sought to be served. It does provide that "the specialized information developed in the course of [personnel] investigations other than credit information . . . shall not be incorporated into credit reports,"⁸⁹ but it lacks specificity as to what is credit information and what is not. In short, the statute leaves much opportunity for invasion of privacy by failing to require relevancy.

6. *Notice by Clients:* The statute does not require the user of a credit report to notify an applicant when an adverse credit report is the reason for denial of credit or other benefits. The act is thus weakened, since the debtor will not have enough knowledge to go to the credit bureau and discuss his report as provided by the act.⁹⁰

7. *Records:* The statute requires no keeping of records regarding the identity of sources and users of information. On the other hand, the act requires deletion of obsolete materials⁹¹ and of data no longer verifiable.⁹²

8. *Remedies:* The statute has no provision allowing suit by a subject for violation of the act by an agency or user. Seemingly, then, an aggrieved consumer will have to seek redress by means of the presently available judicial remedies, which have been shown to be grossly inadequate. It may be valid to inquire whether the act is enforceable at all. There are no provisions for criminal penalties for violation of the act, nor does the act provide for enforcement through the Attorney General's Office. While enforcement by the

84. *Id.* § 50-18-2D.

85. *Id.* § 50-18-2E.

86. *Id.* § 50-18-4A.

87. *Id.* § 50-18-4B.

88. *Id.* § 50-18-3.

89. *Id.* § 50-18-5.

90. See notes 18, 21, and 40 *supra* and accompanying text.

91. N.M. Stat. Ann. § 50-18-6A (Supp. 1969).

92. *Id.* § 50-18-6B.

Attorney General may be allowable by implication, most consumers probably are and will be unaware of the act and of that avenue of enforcement. In short, the consumer himself is provided with little opportunity for remedy.

The New Mexico statute is a step in the right direction and contains some provisions of benefit to the consumer. However, its narrow coverage and its failure to provide comprehensive protection and relief render it inadequate and possibly ineffective.

The information reporting industry serves a vital function in the American economy, and that function will become increasingly vital as the economy grows. However, the individual's right to privacy and to freedom from defamation are at least equally vital. Thus, the law must serve as a watchdog of these rights, for if it does not, no one will. Since the present state of the law provides neither regulation nor remedy, legislative action now seems imperative. The New Mexico Legislature has an obligation to assure protection to consumers in this area, and can do so by strengthening present law to effect a comprehensive scheme of regulation which will be fair to all parties concerned.

It is the recommendation of this Comment that the following changes be made in the New Mexico statute: (1) The title and all other references to "credit bureaus" in the act should be changed to include all agencies and individuals which engage in gathering and furnishing information about consumers;⁹³ (2) a section should be added to the act which requires the consent of the subject to any investigation involving information other than credit information;⁹⁴ (3) a provision should be added which requires the agency or credit bureau to notify consumers of derogatory items in their files;⁹⁵ (4) a provision should be added which requires agencies to

93. The title of the act could be changed to "Consumer Reporting Agencies," and all references to "credit bureaus" in the act could be changed to "agencies." "Agency" would then be defined as "any business or individual engaged in gathering and furnishing credit or other information about consumers." This definition would replace N.M. Stat. Ann. § 50-18-1A (Supp. 1969).

94. The following, which is a modification of S. 823, 91st Cong., 1st Sess. § 164(f) (1969) (set out in note 64 *supra*), is offered as a suggested provision:

50-18-7. Information Gathering and Dissemination—Limitations—A. Unless the individual on whom the information is being gathered agrees otherwise in writing, an agency shall limit the information it gathers to that information which is relevant to consumer credit transactions.

(Subsection B of this suggested section is set out in note 96 *infra*.)

95. The following, which is a modification of S. 2522, 91st Cong., 1st Sess. § 164(a) (1969) (set out in note 65 *supra*), is offered as a suggested provision:

50-18-2F. Every agency shall promptly notify any individual as to information obtained prior to the effective date hereof, and thereafter shall notify him whenever information is obtained by the agency which is, or is likely to be,

limit the collection and furnishing of information to items which are relevant to the purposes to be served;⁹⁶ (5) a provision should be added which requires the users of reports from agencies to notify consumers when an adverse report or item is the reason for denial of credit or other benefits;⁹⁷ and (6) a section should be added which creates civil liability for agencies failing to abide by the act.⁹⁸ It is believed that adoption of the above recommendations will provide New Mexico consumers with the protection they need.*

TOM L. POPEJOY, JR.

interpreted by the agency or its clients as adverse to the credit rating or reputation of the individual.

96. The following, which is derived from S. 823, 91st Cong., 1st Sess. § 164(c) (1969), *supra* note 64, is offered as a suggested provision:

50-18-7B. An agency shall limit the collection, retention, or furnishing of information bearing upon the credit rating or general reputation of any individual to those items essential for the purposes for which the information is sought and shall not collect, retain, or furnish information which only marginally benefits the purposes for which the information is sought or which represents an undue invasion of the individual's right to privacy.

97. The following, which is derived from S. 823, 91st Cong., 1st Sess. § 165 (1969), *supra* note 64, is offered as a suggested provision:

50-18-4C. Whenever credit pursuant to a consumer credit transaction is denied or other prospective transaction with an individual is canceled wholly or partly because of a report of an agency, the person involved shall so notify the individual to whom the credit is denied or with whom the prospective transaction is canceled and shall supply the name and address of the agency making the report.

98. S. 823, 91st Cong., 1st Sess. § 166(a) (1969), *supra* note 64, is recommended as a model provision in this regard, leaving out the words "credit reporting" in the first line to make the provision consistent with the remainder of the New Mexico statute, and adding the words "or negligently" after "wilfully" to broaden coverage to include careless conduct.

* On November 6, 1969, the Senate passed a version of S. 823 which differs substantially from the bill as introduced. *See* 115 Cong. Rec. § 13900 (Daily Ed. Nov. 6, 1969).